

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

**Application by New York Telephone Company
(d/b/a Bell Atlantic –New York), Bell Atlantic
Communications, Inc., NYNEX Long
Distance Company, and Bell Atlantic
Global Networks, Inc., for Authorization
to Provide In-Region, InterLATA Services
in New York**

CC Docket No. 99-295

Reply Comments of Covad Communications Company

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I. Introduction and Summary

The New York Attorney General, the New York Public Service Commission, and now the Department of Justice have all concluded that Bell Atlantic has not satisfied its obligation to provide competitors with nondiscriminatory access to loops and OSS in New York. And still Bell Atlantic refuses to accept that it is seriously deficient in its compliance with the Act, apparently believing that it is somehow entitled to have its application approved even though it “has completed most – but not all – of the actions needed to achieve a fully and irreversibly open market in New York.”¹ Bell Atlantic claims that the Department of Justice merely highlighted “a few technical issues” in its Evaluation, and somehow concludes that the Department actually offered its “support for our long distance application.”² This is not a company interested in following Congress’s mandate to open the local telecommunications marketplace to competition. This is a company that wants its long distance application approved now, despite its noncompliance with the core market-opening provisions of the Act.

The FCC must send a clear and simple message to Bell Atlantic: the Department of Justice says you are not in compliance with the Act, and you must fix your loop provisioning and OSS systems before your 271 application can be approved. If the FCC is serious about getting local competition moving, it must be serious about enforcing the Act. Allowing Bell Atlantic into the long distance market in New York now sends the wrong message: the FCC agrees with Bell Atlantic that its failure to provide functional

¹ Department of Justice Evaluation at 1.

² Statement of James R. Young, Executive Vice President and General Counsel, Bell Atlantic, on Department of Justice Evaluation of Bell Atlantic New York 271 Application, Nov. 1, 1999, available at <http://www.ba.com/nr/1999/Nov/19991102004.html>.

loops and OSS to competitive LECs is merely a “technical issue.” It is not a technical issue. It is the very core of the Act.³

While Bell Atlantic agreed on September 15, 1999, to enter into a collaborative process with data LECs to address its noncompliant loop provisioning, Bell Atlantic rushed its section 271 application to the FCC before it had even begun to remedy its discriminatory practices. As such, Bell Atlantic has not yet begun to provide nondiscriminatory access to unbundled loops in New York – but the process to fix those problems is underway.⁴ In addition, Bell Atlantic’s operations support systems (OSS) currently do not comply with the clear requirements established by the Commission in prior section 271 applications.⁵ As discussed in greater detail below, the only option available to the Commission, given the Department of Justice’s conclusion that Bell Atlantic is not complying with the Act, is to reject Bell Atlantic’s application. But the Commission should do more than merely reject this application: it should, as it has done in the past, provide a clear roadmap to Bell Atlantic, outlining those checklist items that were deficient, and the means by which Bell Atlantic can remedy those deficiencies and

³ “The statute directs that the Commission ‘shall not approve’ the requested authorization unless it finds that the criteria specified in section 271(d)(3) are satisfied.” *Second BellSouth Louisiana 271 Application* at para. 13.

⁴ See Department of Justice Evaluation at 28 (“[B]ecause Bell Atlantic filed this application before the results of those efforts can be seen, we cannot conclude that CLECs currently have access to DSL loops necessary for them to compete effectively”); New York State Attorney General’s Comments at 16 (“BA-NY acknowledges that providing stand alone unbundled local loops for xDSL is new and still under development”); New York PSC Evaluation at 94 (“The xDSL collaborative is defining provisioning methods; standards of performance are being developed . . . [r]ecommendations to the NYPSC are expected in December for the adoption of xDSL-specific metrics”)

⁵ “[W]e cannot conclude on the current record that Bell Atlantic is currently providing adequate access to preordering information needed to provide DSL services.” Department of Justice Evaluation at 26.

present an approvable application to the Commission. This is clearly the Department of Justice's preferred course of action.⁶

Providing a roadmap to Bell Atlantic for opening its network to competition allows Bell Atlantic to demonstrate its commitment to compliance with the Act by remedying the deficiencies with its checklist compliance quickly and permanently. When existing problems are solved to the satisfaction of the Department of Justice and the FCC, the Commission can and should approve Bell Atlantic's application. But the Commission cannot approve Bell Atlantic's application based on some promise of future compliance.⁷ Rather, the FCC must provide clear guidance to Bell Atlantic, offering a roadmap of the immediate steps that Bell Atlantic must take to comply with the Act. Guided by the record of comments of interested parties, and the evaluation of the Department of Justice, Covad now suggests several measures that should be made an integral part of the Commission's roadmap.

II. Unbundled Loops

Based on the record, Bell Atlantic has failed to satisfy its burden of proving compliance with the loops checklist item. This noncompliance alone is sufficient grounds for the Commission to reject Bell Atlantic's application. The Commission should, however, provide concrete guidance to Bell Atlantic on steps it must take to

⁶ "The Department starts with a strong presumption – based on the structure and terms of the statute, on the Commission's prior decisions under Section 271, and on the Department's own economic and competitive analyses – that a BOC should be required to demonstrate that all important market opening measures have been completed before it may enter the long distance market." Department of Justice Evaluation at 42.

⁷ "We are concerned also about the precedential implications of relying on promises of future improvement as a basis for approving applications under Section 271. It would be unfortunate if future applicants were less committed to actually opening their markets because of the expectation that it would be sufficient for them to make such promises." Department of Justice Evaluation at 40, n. 107.

demonstrate its compliance with the checklist. Covad suggests the following measures, which would help ensure that Bell Atlantic is opening its network to competition in New York. These suggestions are by no means an exhaustive list of all of the loop provisioning problems that Covad now faces in New York, nor is it the entirety of measures that Bell Atlantic must adopt in order to demonstrate that it is in full compliance with the law. Rather, the Commission should examine the entire record and ensure that Bell Atlantic takes specific steps to address the host of anticompetitive practices that commenters, and the Department of Justice, have highlighted.⁸ These measures would go a long way toward opening Bell Atlantic's network in New York to local competition. Only when the record of Bell Atlantic's next application to the Commission is complete, however, can the FCC determine whether Bell Atlantic has fully complied with the Act.

As demonstrated by Covad in its initial comments in this docket, Bell Atlantic is providing functional unbundled local loops on time to Covad only 29% of the time.⁹ Although Bell Atlantic paints the delivery of DSL-capable loops as a "new process" that requires "close cooperation" with CLECs,¹⁰ the issue is simple: Covad and other data LECs are now only ordering short loops, and nothing else.¹¹ For Bell Atlantic, provisioning a short loop to Covad is no different than provisioning a new second phone

⁸ "As to Bell Atlantic's historical performance in provisioning DSL loops, we are unable to conclude on the current record that Bell Atlantic has demonstrated an acceptable level of performance." Department of Justice Evaluation at 26-27.

⁹ And in a recent month analyzed by Covad (August), performance had slipped to 13%. Covad Comments at 17; Covad Cutcher/McChesney/Clancy Decl. at paras. 34-36.

¹⁰ Bell Atlantic Application at 19.

¹¹ Covad is not ordering long loops (over 18,000 feet) because BA insists on charging exorbitant non-recurring charges that can be as high as nearly \$5,000 per loop. BA is effectively denying Covad access to long loops.

line to one of its own customers.¹² It's just a loop. All Bell Atlantic has to do is run a loop from its main distribution frame to a customer's NID – it's really as simple as that. And the kinds of provisioning nightmares that New York DSL customers have to tolerate are no different than those that would leave voice customers without service: if Bell Atlantic technicians forget to connect the loop to equipment in the central office, forget to show up at the customer's home to drop the loop, or terminate the loop at the wrong place, neither voice nor data service will work over that loop. Yet Bell Atlantic has no incentive to provision loops on time to Covad, its competitor, whereas it has every incentive to provision loops on time to its own retail customers.¹³ That, of course, is where the section 271 process comes in to provide that incentive.

The Department of Justice concluded that the FCC should reject Bell Atlantic's application and provide a clear roadmap of remedies for deficient checklist performance.¹⁴ In particular, DOJ stressed the importance of certainty in the performance metrics, clarity on the performance standards, and adequate penalties for failure to meet metrics and standards.¹⁵ Covad agrees that this is the most procompetitive step the Commission could take, because it would ensure that Bell Atlantic has the proper

¹² And given the explosion of second line installations Bell Atlantic has experienced in the Internet era, it should have a great deal of experience in provisioning new loops. For example, in its quarterly report just issued, Bell Atlantic noted a 15 % increase in second line installations for Internet access and fax machine use. See "Bell Atlantic Grows Adjusted EPS 10.1% in Third Quarter," available at http://www.bellatlantic.com/invest/financial/quarterly/3q99_release.html.

¹³ The situation is exacerbated by the fact that Bell Atlantic refuses to allow CLECs to provide DSL over an existing loop instead of being required to order a new loop. See NAS Comments at 4.

¹⁴ See Department of Justice Evaluation at 42 ("It is, therefore, our judgment that Bell Atlantic should not be permitted to offer [long distance] services until it demonstrates that it has solved the existing problems in its provision of access to unbundled network elements. The Commission could implement this judgment by denying Bell Atlantic's application in a manner which identifies as clearly as possible the steps that Bell Atlantic must take to secure approval in a subsequent re-application.")

¹⁵ Department of Justice Evaluation at 38. To date, no metrics, standards, or penalties for DSL-capable loops have been imposed on Bell Atlantic and Bell Atlantic has thus far resisted additional performance requirements in the NY PSC Carrier-to-Carrier working group.

incentive to complete the process of opening its network to competition. The Commission should require Bell Atlantic to end its discriminatory loop provisioning by adopting the metrics already put in place by the New York Commission for analog loops – 95% compliance – and applying that standard in the following manner:

1. Firm Order Commitments Provided On Time: Bell Atlantic must provide a firm order commitment (FOC) or due date within 72 hours of the time the competitive LEC submits a loop order for 95% of all loop orders submitted by competitive LECs.¹⁶ The clock must start ticking the moment the order is submitted for the first time, so as to give Bell Atlantic incentive to make error correction instantaneous and mechanized. If Bell Atlantic is permitted to restart the 72-hour clock when a competitive LEC order says “St.” instead of “Street,” it will have no incentive to ensure that its OSS systems actually work quickly to fix order problems. Bell Atlantic should not be permitted to exclude any loops from this metric – not long loops, xDSL-capable loops, ISDN loops, DLC loops – or else this metric is as meaningless as Bell Atlantic’s contention that they are in compliance with loop provisioning requirements today. And Bell Atlantic should provide data that is disaggregated by loop type so that the Commission can readily investigate whether loop provisioning meets the relevant metric. When a competitive LEC orders a loop from Bell Atlantic, Bell Atlantic must return a FOC within 72 hours of the submission of that order.

¹⁶ The Commission must take care to ensure that Bell Atlantic properly disaggregates its loop performance data. As the Department of Justice noted in its Evaluation, Bell Atlantic contended in its brief that its loop performance met New York PSC requirements “on average

2. Loops Provisioned On Time: Bell Atlantic acknowledges that 30 to 40 percent of the FOCs it returns to competitive LECs today are inaccurate.¹⁷ Covad has demonstrated that Bell Atlantic's performance is actually even worse.¹⁸ A requirement to return a FOC on time is meaningless unless accompanied by a requirement that that FOC actually be adhered to.¹⁹ Thus, the Commission should require Bell Atlantic to prove that it actually provisions loops on time to competitors for 95% of loop orders. The FCC should adopt a five business day provisioning interval as the on time metric for Bell Atlantic and use milestones established in the NY PSC's DSL Collaborative as a means to verify that on time delivery has occurred.²⁰ If a loop order is not fully provisioned to Covad (i.e. a functional loop delivered to the address requested by Covad) within a specified interval, Bell Atlantic has missed its performance requirement. As the Department of Justice noted in its Evaluation, Bell Atlantic takes as many as two to three days longer to provision loops to competitors than it does for its own retail customers.²¹ This clear discrimination highlights where Bell Atlantic's incentives rest: service retail customers first, and then if time and facilities are left, service competitive LEC customers last. Absent clear intervals, and performance

¹⁷ Department of Justice Evaluation at 16.

¹⁸ Covad Comments at 17.

¹⁹ See Department of Justice Evaluation at 19 (Bell Atlantic's on time data inflate actual performance because "it reflects a definition of 'on-time' under which an order not completed at the initially scheduled time, but within a subsequently *rescheduled* time, is considered 'on-time,' even if Bell Atlantic ~~failed~~failures caused it to be rescheduled" (emphasis in the original)).

²⁰ In the DSL Collaborative, Bell Atlantic has agreed to implement loop acceptance testing. Acceptance testing involves a joint loop test by Bell Atlantic and the CLEC on the loop due date. If a working loop has been provisioned and Bell Atlantic has given the CLEC demarcation information, the CLEC accepts the loop by giving Bell Atlantic a serial number. Acceptance testing should be a part of the metric for determining on-time loop delivery.

²¹ Department of Justice Evaluation at 19 n. 42.

measures and penalties to back them up, Bell Atlantic will continue to treat itself better than it treats competitive LECs.²²

3. Process to Address “No Facilities”: The Commission must also provide a roadmap for Bell Atlantic to deal with facilities issues. For example, as outlined in extensive detail by Covad in its initial comments, Bell Atlantic has no procedure in place for dealing with “no facilities” order rejections.²³ Bell Atlantic fails to give CLECs adequate information on the facilities issue presented. The “no facilities” rejection could mean that Bell Atlantic has no copper available, has copper available but reserves it for itself, the loop is run through a DLC and Bell Atlantic itself would not provide xDSL to its customers over the loop, or a host of other issues. Further, Bell Atlantic does not have a system in place for resolving such issues in a rapid timeframe. Thus, to prevent Bell Atlantic from artificially inflating its loop performance data, as it has in the instant application,²⁴ the Commission must first require Bell Atlantic to actually reject a loop order within a specified time period of the receipt of that loop order for 95% of all loop orders rejected. Second, the Commission should require Bell Atlantic to provide the reason for the rejection, beyond a simple “no facilities” contention, in a manner that provides the competitive LEC with a meaningful opportunity to resolve the facilities issue. For example, a “no facilities” rejection must indicate why Bell Atlantic rejected the order, whether alternative loop facilities are in fact available, and what those facilities are. Third, the

²² Perhaps the best example of this self-favoritism, as noted by the Department of Justice, is Bell Atlantic’s ability to offer its own retail customers ADSL over the same loop as voice service, without installing a second loop, a functionality that Bell Atlantic refuses to make available to its competitors. Department of Justice Evaluation at 23 n. 55.

²³ Covad Comments at 19-21.

Commission should require Bell Atlantic to actually resolve the loop rejection within a reasonable period of time – not by requiring the CLEC to start the loop ordering process all over again, but by modifying the existing loop order. For example, if Bell Atlantic rejects a Covad loop order for “no facilities” because the copper facility is defective, Bell Atlantic should commit to fixing the defective loop within a specified period of time (such as the time period by which Bell Atlantic would fix a defective loop for its retail customers).. The entire process of dealing with a loop rejection, from time of rejection to either (a) Covad’s determination to cancel the loop order, or (b) Bell Atlantic’s provisioning of a functional loop to Covad, should be the standard loop provisioning interval of 5 business days. Bell Atlantic must satisfy this obligation for 95% of loop orders. If Bell Atlantic is granted anything other than a concrete timetable within which to complete its work, it has no incentive to treat its competitive LEC “customers” in a fair and nondiscriminatory manner, and will continue its practice of resolving its own loop problems much more quickly than its resolves its competitors problems.

4. On-Time Resolution of Trouble Tickets: Bell Atlantic must resolve all trouble tickets with 24 hours for 95% of all trouble tickets submitted. The Commission must make clear that resolving a trouble ticket does not mean, as Bell Atlantic currently contends it does, simply closing the ticket without actually resolving the problem listed on the ticket. The problem must be resolved to the satisfaction of Covad within 24 hours – a time period that Bell Atlantic itself ensures its retail customers it will fulfill. In addition, any Bell Atlantic network failures that cause competitive LEC service

²⁴ “From June through August, [Bell Atlantic] provided 97 percent of the premium loops on time.” Bell

outages must be remedied within 4 hours, to ensure that Bell Atlantic is not restoring service to its own retail customers more quickly than it restores service to competitive LECs.

5. **Acceptance Testing:** The New York Commission, through the xDSL collaborative process, is overseeing loop acceptance testing by Bell Atlantic and competitive LECs. As every party acknowledges, this process is still underway and no evidence has been presented that it is working. The Commission should consider requiring Bell Atlantic to enter into 100% cooperative loop testing as a means to improve Bell Atlantic's loop provisioning, whereby Bell Atlantic and the competitive LEC would agree to test a provisioned loop together and resolve any problems with the loop at that time. While this process can be time consuming and resource intensive for both parties, it is one means of ensuring that Bell Atlantic actually resolves loop problems in a timely manner. Covad questions whether acceptance testing is scaleable as loop volumes increase.
6. **Final Resolution of Loop Pricing:** The Commission must also ensure that Bell Atlantic is pricing its loops in conformity with the Act. Here, Bell Atlantic has failed to shoulder its burden of proof – that loop prices are based on TELRIC and non-discriminatory. On August 30, 1999, Bell Atlantic submitted its “digital loop” tariff to the New York PSC. That tariff became effective on September 9, 1999, and the New York Commission is currently evaluating the lawfulness of that tariff. The tariff is unlawful and not based on TELRIC pricing, and Covad is currently arguing before the New York Commission that the tariff should be rejected. In the interim, Bell

Atlantic's tariff demonstrates incredible anticompetitive loop pricing practices. For example, Covad must pay, for a "conditioned" loop (i.e. a loop without loading coils or bridged taps – a "clean" copper loop) over *four thousand dollars*.²⁵ And, Bell Atlantic's loop prices have caused a chilling effect on DSL competition in New York: no CLEC is offering DSL service to customers that are unfortunate enough to be served by a long loop. This loop pricing is neither forward looking nor cost based, as required by the FCC's pricing methodology rules. It is not forward looking because the most efficient telecommunications network is designed to handle telecommunications services without electronic impedances, like load coils, on the loop. It is not cost based because Bell Atlantic has already recovered the full cost of all of its loop conditioning from the residential voice customers for whom the loop was constructed. Moreover, Bell Atlantic's pricing is discriminatory. Perhaps most telling is the data submitted to the Commission by Covad demonstrating repeated instances in which Bell Atlantic offers ISDN services to its own residential customers with no conditioning charges whatsoever.²⁶ These high loop prices are an bar to competition: Bell Atlantic charges itself no conditioning charges when it provisions xDSL and ISDN services to its retail customers, and ensures that Covad cannot afford to offer service to those same customers by illegally charging thousands of dollars for loops.²⁷ The FCC must ensure that the New York PSC follows the pricing methodology established by the Commission, and that permanent nondiscriminatory loop prices are in effect before Bell Atlantic resubmits its long distance application.

²⁵ See Bell Atlantic New York Tariff 916 at sec. 5.5.2 (two-wire digital designed metallic loops).

²⁶ See Covad Markley Decl. at paras. 22-26. See also NAS Comments at 5.

Many of these loop performance requirements will result in increased work for Bell Atlantic. Indeed, Bell Atlantic will almost certainly need to increase its wholesale operation's staff and funding, implement new procedures, redesign systems, and change operations. The question is not whether Bell Atlantic should have to do all of this work. The question is why it has not done so already. As the Department of Justice noted, "it has been clear for some time that CLECs would seek access to unbundled loops to offer" digital services, especially given the 1996 *Local Competition First Report and Order*, which required incumbent LECs to provide unbundled access to xDSL-capable loops.²⁸ In normal circumstances, a retailer that faces customer demand that outpaces its ability to meet that demand will immediately increase staff and other resources to meet that demand, rather than risk losing customers. But not Bell Atlantic, because its wholesale "customers" are also its competitors. So as demand increases, Bell Atlantic leaves its capability for meeting that demand at exactly the same level.²⁹ Competitors suffer, and Bell Atlantic need not worry about losing its "wholesale customers" because they have nowhere else to go. Only with concrete performance requirements in place, backed by metrics, penalties, and the threat of another rejected long distance application, will Bell Atlantic have any incentive at all to better serve its competitive LEC customers.

III. Operations Support Systems

²⁷ Moreover, Bell Atlantic's refusal to allow linesharing makes its loop pricing even more egregious and discriminatory.

²⁸ Department of Justice Evaluation at 23-24.

²⁹ "Moreover, it appears that as Bell Atlantic struggles to improve its performance in returning manually processed order confirmations and rejections more quickly, its accuracy suffers significantly. In September, Bell Atlantic improved its combined UNE-P/UNE-L on-time performance for confirmations and rejections, but only 42 percent of manually processed orders were correctly submitted by Bell Atlantic personnel to Bell Atlantic's provisioning systems (significantly down from only 64 percent for August.)" Department of Justice Evaluation at 16.

Bell Atlantic has not satisfied its obligation to provide nondiscriminatory access to its operations support systems (OSS). Bell Atlantic is required to provide mechanized OSS interfaces that allow competitors a meaningful opportunity to interact electronically with Bell Atlantic's pre-ordering, ordering, provisioning, maintenance and repair, and billing systems. As the Department of Justice concluded, Bell Atlantic is not now providing nondiscriminatory access to OSS. Indeed, the Department noted that 83% of loop orders required manual processing by Bell Atlantic, leading to an inordinately high number of late or inaccurate FOCs and order rejections.³⁰ "The high level of slow and inaccurate manual order processing imposes significant costs on CLECs," the Department concluded.

Pre-ordering³¹

Competitive LECs must have meaningful access to loop pre-ordering information in order to market service to its customers. Unlike Bell Atlantic, Covad cannot inform its customers what type of xDSL service, if any, it can provide until after submitting a loop order to Bell Atlantic.

Bell Atlantic makes much ado about the considerable efforts it is undergoing to create an entirely new, DSL-specific loop qualification database that is available to CLECs as well as to its own retail organization. The Commission should not let itself be distracted by Bell Atlantic's bluster. For one, this database has been created solely to support Bell Atlantic's DSL strategy, being populated with loop information for central offices of relevance only to Bell Atlantic's DSL deployment and with loop information of

³⁰ Department of Justice Evaluation at 17.

³¹ "[W]e cannot conclude on the current record that Bell Atlantic is currently providing adequate access to preordering information needed to provide DSL service." Department of Justice Evaluation at 26.

relevance only to Bell Atlantic's ADSL offering. And, Bell Atlantic's DSL strategy is: (1) limited to ADSL service; (2) limited to customers who live near their central offices; and (3) limited to only certain parts of New York. Assuming the loop qualification database is helpful to foster even this woefully inadequate entry strategy -- and it is not -- CLECs can do no better than Bell Atlantic in the DSL space. Clearly, the Act requires more than merely giving CLECs the opportunity to mimic Bell Atlantic. In addition, the database doesn't work as advertised. There are systemic problems with the interface that make it more difficult to use than manual processes.³²

Bell Atlantic must be required to provide mechanized access to all of the loop prequalification information that Bell Atlantic has available to itself such as loop length, number and location of load coils and bridged taps, presence and type of DLC, pair gain devices and digital access main lines ("DAMLs").³³ As attested to by other CLECs, this access is easily attainable using *existing* Bell Atlantic databases.³⁴ For example, Bell Atlantic has access to electronic databases in which much of the information needed by data CLECs is contained. Thus, there is no need to create a whole new "DSL database" at unjustified cost and delay to CLECs. Bell Atlantic must make all relevant information available to competitive LECs as it is available to itself by providing mechanized access to existing databases like LFACS, TIRKS, and other OSS systems that contain such information. Only with access to loop prequalification information can competitive LECs fairly and accurately assess product options available to their customers, an ability that currently Bell Atlantic makes available only to itself.

³² Northpoint Comments at 10.

³³ Rhythms Comments at 14; Northpoint Comments at 11.

As Bell Atlantic updates its own OSS systems, it must continue to make access to those systems available on a nondiscriminatory basis. In order to ensure ongoing compliance with its rules, the Commission must require Bell Atlantic to implement a change management system that provides competitive LECs immediate and functional access to Bell Atlantic's OSS.³⁵ This is particularly important given the Department of Justice's conclusion that "Bell Atlantic's EDI documentation has been so unstable that it has impaired CLEC ability to develop these interfaces"³⁶ The New York collaborative currently underway should address these change management issues to ensure that Bell Atlantic actually provides functional OSS capabilities to competitors. The Commission must ensure that in providing nondiscriminatory access to OSS, Bell Atlantic ensures that the necessary personnel, equipment, training and documentation, software, and other necessary tools are fully available to competitive LECs.

Ordering³⁷

Bell Atlantic does not provide a mechanized ordering system that permits loop orders to flow through its OSS systems without manual intervention.³⁸ As part of the ongoing collaborative process, Bell Atlantic and competitive LECs are working to improve the mechanized functionality of loop ordering. The Commission must make

³⁴ Rhythms Comments at 17-18 (information on loop makeup does or should reside in BA-NY's existing LFACS or TIRKS database); Northpoint Comments at 11-12 (Bell Atlantic's engineering and support staff do have electronic access to electronic databases in which much of this information is contained).

³⁵ See Letter from Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC, to Nancy E. Lubamersky, Executive Director, Regulatory Planning, U S WEST, dated Sept. 27, 1999 ("The change management process should provide information which can be used to evaluate the methods and procedures that the BOC employs to communicate with CLECs regarding OSS system performance and system updates.")

³⁶ Department of Justice Evaluation at 34.

³⁷ "At the present time, orders for DSL loops do not flow through Bell Atlantic's ordering systems, but must be manually processed before entry into the provisioning systems." Department of Justice Evaluation at 26. See also Northpoint Comments at 4-5

³⁸ Covad Conley-Poulicakos Decl. at 19-20. See also Northpoint Comments at 15; Rhythms Comments at 9.

clear to Bell Atlantic that any manual intervention in the loop ordering process is discriminatory, and that Bell Atlantic must have a flow-through process in place in order to demonstrate compliance with this checklist requirement. While Bell Atlantic has promised to improve its flow-through performance to 72-77% of orders by June of 2000, the “results of these process improvements, however, do not appear in the current record.”³⁹ Bell Atlantic should be required to make the necessary improvements to its OSS before resubmitting its section 271 application. As discussed in Covad’s initial comments, the FCC has outlined in each of its prior section 271 orders the specific OSS functionalities that BOCs must make available to competitors – and Bell Atlantic must meet those requirements before its application is approved.

IV. Performance Metrics

As the Department of Justice concluded, all of these performance requirements are meaningless absent strong metrics and penalties to monitor and ensure performance. Covad agrees with the Department of Justice that such metrics must have three important qualities:

1. “Clarity as to the precise level of performance that will be required.”⁴⁰ As the New York PSC and the Department of Justice both concluded, performance metrics and penalties for loops that are used to provide DSL and other data services are not currently in place in New York. Covad and other competitive LECs are working in the NY PSC’s carrier-to-carrier working group to develop concrete measures to assist Bell Atlantic in satisfying its burden of proof in subsequent applications. As it stands now, however, Bell Atlantic has presented no data, no metrics, and no performance

³⁹ Department of Justice Evaluation at 36.

assurance plan related to xDSL loop provisioning. The FCC should instruct Bell Atlantic to ensure that the New York working group develops fair reporting measures that are testable by an independent third party, collected pursuant to published business rules, and subject to an independent quantitative verification of the reported data. The KPMG test was an important first step toward evaluation of Bell Atlantic's loop performance, and the New York Commission should be commended for recognizing that Bell Atlantic needs to adopt further performance measures for DSL loops before it can prove its compliance with the loops checklist item.

2. "Certainty that inadequate performance will be sanctioned."⁴¹ Bell Atlantic cannot be granted the opportunity to view performance requirements as options instead of obligations. Thus, for example, the Department of Justice warns against giving Bell Atlantic the option to request waivers, which creates the "potential for litigation and delay in imposing penalties and uncertainty that inadequate performance will in fact be punished."⁴² More importantly, the Department cautions that mere promises of compliance are not permitted: "It would be unfortunate if future applicants were less committed to actually opening their markets because of the expectation that it would be sufficient for them to make such promises."⁴³ The Commission has placed the burden of section 271 applicants to prove not only that they are legally obligated to provide checklist items to competitors, but that they are actually providing competitors with nondiscriminatory access to such items as required by the Act. Bell

⁴⁰ Department of Justice Evaluation at 38.

⁴¹ Department of Justice Evaluation at 38.

⁴² Department of Justice Evaluation at 39. For example, the Department notes that as to its retail performance regulatory plan in New York, in effect since September of 1995, Bell Atlantic has already sought waivers for 17 months of their noncompliant performance data. *Id.* at n. 105.

⁴³ Department of Justice Evaluation at 40 n. 107.

Atlantic's failure to actually provide nondiscriminatory access to loops and OSS in New York, despite having legally bound itself to do so, demonstrates the importance of the Commission's two-pronged requirement. In requiring Bell Atlantic to subject itself to performance measures, the Commission must ensure that Bell Atlantic does more than merely commit itself to comply with the Act – Bell Atlantic must be subjected to real punishment if it fails to meet its promises. Absent the threat of sanction, Bell Atlantic simply has no incentive to comply, and absent the assurance such sanctions will actually be imposed, Bell Atlantic will simply come up with some excuse for its poor performance to avoid penalty.⁴⁴

3. "Adequate penalties that are large enough to create incentives for adequate performance."⁴⁵ The Department of Justice concluded that the billing credits that Bell Atlantic trumpets as sufficient incentive to ensure its compliance with the Act are small, insufficient to ensure Bell Atlantic's compliance, and "not at all clear" as to their effectiveness.⁴⁶ The Department makes clear that the section 271 process is the most important regulatory measure to ensure BOC compliance with the Act, and that ensuring full compliance with the checklist before approving an application "will be more effective in securing rapid and effective removal of the remaining barriers to competition in New York."⁴⁷

V. Conclusion

⁴⁴ For example, the Department of Justice notes that the current performance measures in effect in New York permit Bell Atlantic to modify its poor performance results based on such amorphous events as "non-normal operating conditions" and "unusual CLEC behavior." Department of Justice Evaluation at 39. Covad agrees with the Department that Bell Atlantic's ability to seek such waivers effectively eviscerates the performance measure process.

⁴⁵ Department of Justice Evaluation at 38.

⁴⁶ Department of Justice Evaluation at 40.

⁴⁷ Department of Justice Evaluation at 40.

The Department of Justice's determination that Bell Atlantic has not satisfied the checklist is a conclusive finding that the Commission must afford substantial weight.⁴⁸ Bell Atlantic filed the instant application before it was in compliance with the checklist, and as such, based on the record Bell Atlantic's application must be rejected.⁴⁹ But the Commission should take the positive step of encouraging Bell Atlantic to fix the problems with its loops and OSS rapidly, because Bell Atlantic's failure to fix those problems harms both Bell Atlantic, because it can't get into the long distance market, and its competitors, because they can't compete fairly. By providing a specific roadmap to Bell Atlantic, the Commission serves the compatible goals of fostering competition in the local marketplace, and providing Bell Atlantic the guidance it needs to present a successful section 271 application.

⁴⁸ "Because the Commission must accord substantial weight to the Department of Justice's evaluation of a section 271 application, if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, the BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof." *Second BellSouth Louisiana 271 Order* at para. 52.

⁴⁹ "[W]e limit our analysis to factual evidence proffered by BellSouth on the date of its application and evidence in its replies that is directly responsive to arguments raised by parties commenting on its application." *Second BellSouth Louisiana 271 Order* at para. 52 n.140. See also Department of Justice Evaluation at 2 ("Bell Atlantic has not yet demonstrated that it can adequately provide access to unbundled local loops, either for traditional voice services or for digital subscriber ("DSL") technology used to provide a variety of advanced services.")

Respectfully submitted,

A handwritten signature in black ink that reads "Jason D. Oxman" with a stylized flourish at the end.

Jason D. Oxman

Susan Jin Davis

Covad Communications Company
600 14th Street, N.W., Suite 750
Washington, D.C. 20554

(202) 220-0400

CERTIFICATE OF SERVICE

I, Florence M. Grasso, hereby certify that I have this 8th day of November, 1999, caused a copy of Reply Comments of Covad Communications Company to be served on the parties listed below:

Luin P. Fitch
Donald J. Russell
Frances Marshall
Department of Justice
Antitrust Division, Suite 8000
1401 H Street, N.W.
Washington, D. C. 20530
(Via hand delivery)

Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554
(Via hand delivery)

Carol Matthey
Margaret Egler
Jake Jennings
Michelle Carey
Claudia Pabo
Jessica Rosenworcel
Daniel Shiman
Andrea Kearney
Johanna Mikes
Julie Patterson
Eric Einhorn
Jane Jackson
Rhonda Lien
Raj Kannan
Renee Terry
Robert Atkinson
Larry Strickling
Bill Bailey
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554
(Via hand delivery)

Rebecca Beynon
Legal Advisor to Commissioner
Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554
(Via hand delivery)

Sarah Whitesell
Legal Advisor to Commissioner Tristani
Federal Communications Commission
445 12th Street, S.W.
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(Via hand delivery)

Dorothy Attwood
Legal Advisor to Chairman Kennard
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(Via hand delivery)

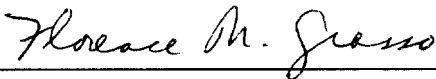
Kyle Dixon
Legal Advisor to Commissioner Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554
(Via hand delivery)

Linda Kinney
Legal Advisor to Commissioner Ness
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445 12th Street, S.W.
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Mary Ellen Burns
NYS Department of Law
120 Broadway
New York, NY 11207
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Maureen O. Helmer
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Public Service Commission State of New York
Three Empire State Plaza
Albany, NY 12223-1350
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Florence M. Grasso